SUPREME COURT, U. S.

MAR 21 1968

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 898

JOHNNY SABBATH,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

MURRAY H. BRING
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner

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Opinion Below

The opinion of the Court of Appeals for the Ninth Circuit (R. 54-58)[1] is reported at 380 F.2d 108.

Jurisdiction

The judgment of the Court of Appeals was entered on June 27, 1967 (R. 59). On July 28, 1967, Mr. Justice White

[1] The parties have agreed through Stipulation on those portions of the Record below which shall appear in the printed Appendix. All references in this Brief to that Appendix will be designated by the letter "R."

extended the time for filing a petition for a writ of certiorari to and including August 26, 1967 (R. 60). The petition, *in forma pauperis*, was filed on August 25, 1967, and was granted on December 11, 1967 (R. 61). The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

Question Presented

Petitioner was arrested in his apartment by federal customs officers, who discovered narcotics and other incriminating evidence in the course of a search of the apartment conducted after the arrest. The question presented is whether the seized evidence should have been excluded at petitioner's trial for alleged violations of the federal narcotics laws, because the arrest and the search leading to the seizure were unlawful on either of the following two grounds:

(1) That the arresting officers entered petitioner's apartment to make the arrest by opening the closed but unlocked door leading into the apartment, without first giving notice of their authority and purpose and being refused admittance, as is required by 18 U.S.C. § 3109; or

(2) That the arrest and the resultant search were made without a warrant of any kind, at night, after an unconsented to entry into petitioner's home, under circumstances which do not excuse the officers' failure to obtain a warrant.

Constitutional Provision and Federal Statute Involved

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Section 3109 of Title 18 of the United States Code, 62 Stat. 820, provides:

> "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

Statement

On Saturday, February 19, 1966, a Mr. William Jones was stopped by Customs Inspector Yates at the San Ysindro, California port of entry into the United States, while attempting to cross the border from Mexico as a pedestrian (R. 5). Inspector Yates searched Jones and discovered a condom containing about an ounce of cocaine concealed on Jones' person (R. 5). When questioned by

customs officers, Jones initially stated that he was the only person involved in transporting the cocaine from Mexico to the United States (R. 14). After being in custody for some three or four hours—during which time the customs agents asked Jones "quite a few questions" (R. 15)—he altered his explanation and told the agents that he was bringing the narcotics back for someone named "Johnny" in Los Angeles (R. 14-15).[2]

Two Customs Port Investigators then took Jones to Los Angeles, where they met with a number of Los Angeles customs officers (R. 42). At approximately 2:45 a.m. on the morning of February 20, 1966, Jones, in the presence of customs agents, dialed a Los Angeles telephone number (R. 42-43). The call was not answered (R. 43). The number called was written on a card which Jones was carrying in his wallet at the time of his arrest, and on which also appeared the name "Johnny" (R. 8, 43). Between 2:45 a.m. and 5:00 a.m., three additional calls were placed to the same Los Angeles number, but no one answered any of those calls (R. 43). Thereafter, the agents apparently took Jones from Los Angeles back to the San Diego area (R. 42-44).

At 3:00 p.m. on the afternoon of February 20, 1966, Customs Port Investigator Gore dialed the Los Angeles number again; this call was placed from the Narcotics Division of the San Diego Sheriff's Office (R. 44). A male voice answered the phone (R. 44). Jones addressed that

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[2] At the trial, Jones testified that Johnny had driven him to Mexico and had promised to give him $100 for transporting the cocaine across the border (R. 11-12). It appears from the Record that Jones informed the agents of these facts (R. 25).

person as "Johnny" and identified himself as "B.J." (R. 44).[3]

During the conversation, Jones told "the party on the other end" that he was still in San Diego and that he still had "his thing" (R. 44, 8). The other party inquired whether Jones had experienced "any trouble getting through the line" (R. 44, 8). When Jones indicated that he had not, the person identified only as "Johnny" replied that he had encountered some trouble while in Mexico (R. 44).[4] Jones then inquired whether "Johnny" planned to remain at home, and, upon receiving an affirmative answer, said that he would come to Johnny's apartment (R. 44). Jones had been to "Johnny's" apartment before and knew the location, but he did not know the specific address (R. 10, 31, 8, 13).

There is nothing in the Record to suggest that the federal officers took any independent action to corroborate Jones' story or the cryptic remarks overheard during the telephone conversation between Jones and "Johnny." Apparently, the officers did not even make a routine check of police files to determine whether Jones—whom they had not known prior to the evening of his arrest—had a prior narcotics record (R. 26-27). Nor was any effort expended

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[3] Two customs agents listened to the conversation between Jones and "Johnny," and a recording of the conversation was made (R. 44). The recording was not offered at the trial, but one of the agents testified concerning the conversation he overheard (R. 5, 44).

[4] At the trial, petitioner's uncontradicted testimony was that during his visit to Mexico he had been falsely arrested by the Mexican authorities who had tried to confiscate his money (R. 33-36). He further testified that the Mexican police ultimately released him from custody, and that his inquiry to Jones about "trouble at the line" was prompted by his own experience with the Mexican authorities (R. 38).

to obtain further knowledge about "Johnny" or to trace the telephone number which Jones had called.

Instead, between 7:30 p.m. and 8:15 p.m. on the evening of February 20, 1966, four or five federal customs officers brought Jones to the apartment building in which petitioner lived (R. 7, 19, 21, 37, 44). They did not have a warrant authorizing petitioner's arrest or permitting a search of his apartment (R. 26). The agents then outfitted Jones with a radio transmitting device (R. 16, 19).

Jones proceeded to petitioner's apartment alone, while the customs agents took up positions outside the building (R. 9, 20). Jones knocked on the door of the apartment, and the door was opened by a woman who was visiting petitioner (R. 9, 20, 36-37). The woman admitted Jones to the apartment and closed the door (R. 9, 20, 37). After being admitted into the apartment, Jones waited in the living room while the woman went back to the bedroom to call petitioner (R. 9, 36-37). Petitioner joined Jones in the living room, while the woman remained in the bedroom (R. 9, 40).

In the meantime, the customs agents were attempting to make use of the transmitter which had previously been placed on Jones (R. 20-21). Through that device, they heard Jones knock on the door and ask the woman who answered if "Johnny" was at home (R. 20). They heard the woman answer "yes" and then the sound of footsteps (R. 20). The agents then heard a male voice talking to Jones (R. 20). However, because stereo music was being played in the apartment, they were able to hear only fragmentary portions of the ensuing conversation (R. 20-21). Among the fragments which they heard was an inquiry

"something to the effect: 'Did you have any problems getting through the line?'", and Jones' response in the negative (R. 21). They also heard one of the voices mention the word "package," and a garbled reply from the other person (R. 21).[5]

Since the agents "were not getting real good reception on the electronic device due to the loud music, [they] decided it was time to go into the apartment" (R. 21). Four agents proceeded to the apartment, and one of them knocked on the door (R. 21). None of the agents announced his authority or purpose. They "waited a few seconds," during which time no answer came from within (R. 21). The agent who knocked then "opened the unlocked door and came into the apartment" (R. 21).[6] He was accompanied by at least one of the other agents (R. 45). The agents entered the apartment with their guns drawn (R. 26, 41).

As the agents entered, they saw Jones sitting on a chair next to the couch in the living room and another man (petitioner) sitting on the couch, dressed only in an undershirt and a pair of boxer shorts (R. 21-23, 25, 45-46). The agents testified that they saw petitioner sitting with his right hand "between" or "underneath" the cushions of the

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[5] The agents attempted to make a recording of the conversation picked up over the transmitter (R. 26). If such a recording was made, it was not offered at the trial (R. 5). Instead, the agents testified as to what they had overheard by use of the transmitter (R. 20-21).

[6] One of the agents testified that approximately 5 minutes elapsed from the time Jones went to petitioner's apartment to the time they entered the apartment (R. 21). Petitioner estimated that the amount of time between those two events was "five to eight, ten minutes" (R. 39).

couch, and that shortly after their entry, he withdrew his hand from beneath the cushions and placed it on his right knee (R. 23-24, 45). The officers then immediately arrested both Jones and petitioner, removed petitioner from the couch, placed him against the wall, handcuffed him, and searched both Jones and petitioner (R. 24, 45-46).

A third agent then immediately searched the couch, and found the rubber contraceptive containing the cocaine under the cushion on which petitioner had been sitting (R. 24, 46). The agents also conducted a general search of the apartment (R. 47). In the bedroom, they found some small rubber balloons, a number of one-and-a-half to two inch aluminum foil squares, approximately $500, and about 300 Dexamyl tablets. More balloons and aluminum foil squares were found in the kitchen (R. 47).[7]

Jones was not in possession of the promised $100 at the time of the arrests in petitioner's apartment (R. 25). He had not received this payment because—in his own words—he "forgot about it" (R. 11, 13).

On March 2, 1966, petitioner and Jones were indicted on two counts. The first charged them with knowingly importing and bringing approximately one ounce of cocaine into the United States from Mexico, in violation of 21

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[7] None of the evidence other than the container of cocaine was introduced at the trial. However, there was considerable testimony concerning the balloons and aluminum foil squares (R. 47-49). Conflicting explanations were offered for the presence of the balloons and aluminum foil squares in petitioner's apartment. One of the officers testified that both the balloons and the aluminum squares could be used as containers for narcotics (R. 47-48). Petitioner testified that the balloons had been bought for his son, and that the aluminum foil squares were used in his carpet cleaning business to rest the legs of furniture on so that the cleaning substances put on the carpets would not soil the furniture (R. 48-49).

U.S.C. § 173;[8] the second charged them with knowingly concealing and facilitating the transportation and concealment of unlawfully imported cocaine, in violation of 21 U.S.C. § 174[9] (R. 2-3).

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[8] Section 173 of Title 21 of the United States Code provides:

"It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

"Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes."

[9] Section 174 of Title 21 of the United States Code provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue

Petitioner was tried alone.[10] At the trial, his court-appointed counsel objected to the admission into evidence of the cocaine seized in petitioner's apartment (R. 28). The objection was based on grounds (1) that the agents had gone to the apartment "without a warrant, with the intention of arresting the occupants"; (2) that the agents lacked probable cause for making the arrest, in that the only basis for the arrest was "the information given . . . by Jones", who was not "a reliable informant"; and (3) that the agents were not justified in "breaking into [petitioner's] apartment without a warrant" (R. 28). The court dismissed the objection and denied the motion for exclusion (R. 29).

On appeal from his conviction, petitioner was represented by a second court-appointed counsel. Petitioner again challenged the receipt of the cocaine into evidence. The Court of Appeals for the Ninth Circuit affirmed the conviction, holding, *inter alia*, that the federal officers had probable cause to make the arrest. The Court rested its holding on the following facts:

> "By the time the arrest was made and apart from anything said by Jones, the officer knew that Jones had brought narcotics over the border, that he had a card with defendant's telephone number in his possession,

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Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

[10] The Record does not indicate whether Jones was ever tried.

that defendant knew Jones and was willing to receive him in his home, that defendant knew that Jones had been across the border, that defendant himself had been near the border and that Jones and defendant had some mutual interest in a thing or package." (R. 56).

With respect to petitioner's claim that the arrest was unlawful because the agents had not announced their authority and purpose before entering the apartment—in accordance with the requirement of 18 U.S.C. § 3109—the Court agreed that the arrest was unlawful "if the entry made by opening a closed door without the necessary statutory formality was a breaking" (R. 57). However, the Court concluded, as follows, that the statute had not been violated:

> "We hold that an entry made through a closed but unlocked door is not a breaking. We realize that the distinction between using a door knob to turn a latch, and using a key obtained without permission to turn a bolt, may be slight. It may be that a door which is locked does give more warning of a desire for privacy than one which is not locked; but, in any event, we are of the opinion that the word 'break' has been taken far enough from the connotations of force which usually accompany it, and we are not willing to take it any further for the purpose of enlarging a rule of exclusion. The arrest was lawful." (R. 58).

Summary of Argument

The Court of Appeals erred in holding petitioner's arrest lawful. Accordingly, the evidence seized during the search of his apartment which followed the arrest should have been suppressed at the trial.

1. Section 3109 of Title 18 of the United States Code governs the manner in which a federal officer may break into a private dwelling to effect an arrest. It requires that the officer must first give "notice of his authority and purpose" and be "refused admittance" before he may "break" into the premises. In *Miller* v. *United States*, 357 U.S. 301, 313 (1958), this Court recognized that because the announcement requirement of the statute has become "deeply rooted in our heritage," it "should not be given grudging application."

The Court of Appeals below failed to heed this Court's admonition. By holding that the officers' unannounced entry into petitioner's apartment through a closed but unlocked door did not constitute a breaking within the meaning of the statute, the court below relied upon the untenable theory that the use of "force" is an indispensable element of a breaking. This result is inconsistent with the legislative history of the statute, with the basic objectives of the announcement requirement contained in Section 3109, and with the decisions of other federal courts which have considered the question.

The legislative history and common law antecedents of Section 3109 disclose the error of the Court of Appeals' ruling. Section 3109 first appeared as part of the Espionage Act of 1917. The announcement provision of the Act was

based upon the existing law of New York, which followed the common law rule that a police officer committed a breaking whenever he entered in a manner which would constitute a breaking in relation to the crime of burglary. The New York law was equally clear, as was the common law, that entry into a dwelling by any means—including the mere turning of an unlocked door knob—was sufficient to support a conviction for burglary. It is therefore clear that by referring to the law of New York, Congress intended to incorporate the common law rule that entry through a closed but unlocked door constitutes a breaking within the meaning of Section 3109.

The Court of Appeals' decision is also at odds with the policy considerations which underlie the statute. The announcement requirement embodies a rule of conduct which is designed to give effect to the substantive guarantees of the Fourth Amendment. Specifically, it seeks (1) to preserve the individual's right to be free from unexpected, frightening, and embarrassing intrusions into the privacy of his home, (2) to compel police conduct which is consonant with the presumption of innocence, and (3) to avoid the unnecessary violence which frequently accompanies unannounced invasions of private dwellings. The pursuit of these objectives is no less important when the police make an unannounced entry through a closed but unlocked door, than when they must force the door bolt in order to gain access. In each case, the closing of the door signifies the occupant's desire to enjoy the privacy of his home; in each case, the occupant is entitled to a presumption of innocence and to the assumption that he will voluntarily open his door to officers who announce their authority and lawful purpose; and in each case, the unannounced entry of

the police may result in an unnecessarily violent confrontation.

The distinction between locked and unlocked doors drawn by the court below has been rejected by other federal courts. For example, the Circuit Court of Appeals for the District of Columbia has properly noted that the protection afforded by Section 3109 should be "governed by something more than the fortuitous circumstance of an unlocked door." *Keiningham* v. *United States*, 287 F.2d 126, 130 (1960). In another context, this Court has also recognized that entry through a closed but unlocked window constitutes a breaking. *Chapman* v. *United States*, 365 U.S. 610, 616 (1961).

Section 3109 establishes an important standard governing the conduct of federal officers who break into private dwellings to effect arrests or searches. The Court of Appeals below has interpreted the statute in a manner which would permit a substantial relaxation of that standard, and which is inconsistent with the basic objectives served by the announcement requirement. Its decision should be reversed.

2. The nighttime arrest of petitioner in his home was unlawful, in view of the officers' failure to seek a warrant, under circumstances which do not excuse their failure to do so.

This is a case in which the manner, timing, and place of the arrest were entirely within the control of the federal officers. Prior to arresting petitioner, they had already seized the narcotics which were allegedly being delivered to him, and had arrested Mr. Jones, the person who claimed to

have been hired to make the delivery. An entire day elapsed between the arrest of Jones and the agents' arrival at petitioner's apartment. During that time, they could easily have attempted to secure a warrant authorizing petitioner's arrest. They chose not to do so. Instead they proceeded to petitioner's apartment, outfitted Jones with an electronic bug, and sent him into the apartment—apparently in the hope that they could arrest petitioner in possession of the narcotics. Within approximately five minutes thereafter, the officers entered the apartment, arrested petitioner, and conducted a general search of the premises.

In *Jones* v. *United States*, 357 U.S. 493, 498 (1958), the Court acknowledged that "whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment," presents a "grave constitutional question.". The Court declined to pass on the question there; petitioner urges that it do so here and reemphasize the importance of the warrant procedure by declaring petitioner's arrest unlawful due to the absence of a warrant.

This Court has frequently recognized the paramount role which the warrant procedure plays in protecting the individual from unreasonable police conduct. The significance of an independent judicial determination of probable cause is most obvious when the arrest is to be executed in a private dwelling, since the home has always been viewed as a preferred place whose "seal of sanctity" is not to be broken lightly.

Since recent decisions of this Court indicate that, under appropriate circumstances, probable cause may be based

on the credible hearsay statements of unidentified informants, and that, in limited situations, "mere evidence" may be seized during the search which accompanies the arrest, there is all the more reason to require that the magistrate's judgment—and not that of the police—should determine whether probable cause exists for the arrest and the search which usually follows. Otherwise, a substantial safeguard of individual liberty will be jeopardized.

A strict adherence to the warrant procedure also serves the legitimate interests of law enforcement. Recourse to the magistrate affords the police an opportunity for an impartial judgment as to their contemplated action and helps them avert improper conduct.

The federal officers in this case were obviously disinterested in securing a judicial imprimatur for their conduct. Despite ample opportunity to seek a warrant, they preferred instead to act on their own authority. The Court should not condone such complete defiance of the warrant procedure.

ARGUMENT

I.

The Court Below Erred in Holding That the Arrest of Petitioner in His Home by Federal Officers Who Entered the Premises by Opening a Closed but Unlocked Door Without First Announcing Their Authority and Purpose and Being Refused Admittance Was Lawful; the Evidence Seized in the Search Conducted After That Arrest Should Therefore Have Been Excluded at Petitioner's Trial.

It was undisputed at petitioner's trial that none of the federal officers who entered petitioner's apartment made an announcement of his authority or purpose before entering. Rather, one of them knocked on the door, waited a few seconds, turned the knob of the door, and walked into the apartment with his gun drawn. If the opening of a closed but unlocked door constitutes a "breaking," the arrest was clearly unlawful under 18 U.S.C. § 3109[11]—which authorizes

[11] It seems clear that the officers' conduct in this case should be measured by the standards set forth in Section 3109, and not by the law of California governing the execution of arrests. There is nothing in this Court's opinions in *United States* v. *Di Re*, 332 U.S. 581 (1948), or *Miller* v. *United States*, 357 U.S. 301 (1958), which compels a different conclusion. In *Di Re*, the Court merely held that the lawfulness of an arrest by a *state* officer for a federal offense should be tested by state law. While the Court did indicate in *Miller* that "the validity of the arrest of petitioner is to be determined by reference to the law of the District of Columbia," *id.* at 305-06, that result followed because—as in *Di Re*—the only officer who had authority to make the arrest involved there was a member of the local police force. *Id.* at 305. The Court specifically noted, however, that there was a similarity between the requirements of Section 3109 and those of the District of Columbia, and that its decision to grant certiorari was warranted because it was dealing with a "statute which is not confined in operation to the District of Columbia." *Id.* at 306. This statement clearly suggests that

a federal officer to "break open" an outer door of a house or apartment only if, "after notice of his authority and purpose, he is refused admittance." [12]

The common law antecedents and legislative history of Section 3109, the objectives which that statute was meant to serve, and the prior decisions of this Court and of other federal courts lead to only one conclusion, namely, that an unannounced entry by federal officers through the closed outer door of a private dwelling is an unlawful breaking within the meaning of the statute.

A. The Common Law Roots and Legislative History of Section 3109 Reveal the Error of the Lower Court's Ruling.

This Court has recently had occasion to acknowledge the common law underpinnings of the announcement requirement embodied in Section 3109. In *Miller* v. *United States*, 357 U.S. 301, 306-07, 308 (1958), the Court indicated that

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Section 3109 shall govern arrests made by federal officers for federal offenses—as the Court subsequently indicated in *Wong Sun* v. *United States*, 371 U.S. 471, 482-84 (1963). See *Ker* v. *California*, 374 U.S. 23, 40, n. 11 (1963).

Various federal courts, including the court below in this case, have accordingly held that federal agents making arrests in private dwellings for federal offenses are subject to the requirements of Section 3109. See, *e.g.*, *Munoz* v. *United States*, 325 F.2d 23 (9th Cir. 1963); *United States* v. *Nicholas*, 319 F.2d 697 (2d Cir.), *cert. denied*, 375 U.S. 933 (1963); *United States* v. *Sims*, 231 F. Supp. 251 (D. Md. 1964).

[12] Although Section 3109 deals specifically only with the execution of search warrants, this Court recognized—and the Government conceded—in *Miller* v. *United States*, 357 U.S. 301, 306 (1958), that "the validity of the entry to execute the arrest without warrant must be tested by criteria identical with those embodied in 18 U.S.C. § 3109, which deals with entry to execute a search warrant." See *Wong Sun* v. *United States*, 371 U.S. 471, 482-84 (1963).

> "From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest."
>
> • • •
>
> "Whatever the circumstances under which breaking a door to arrest for felony might be lawful, however, *the breaking was unlawful where the officer failed first to state his authority and purpose for demanding admission.*" (Emphasis supplied.)

Thus, as early as 1603, the principle was firmly established in the landmark decision in *Semayne's Case*, 5 Co. Rep. 91a, 11 E.R.C. 629, 77 Eng. Repr. 194, 195, that

> "In all cases where the King is party, the sheriff (if the doors be not open) may break the party's house, *either to arrest him*, or to do other execution of the K.'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . .*" (Emphasis supplied.)

Since its first promulgation in *Semayne's Case*, the requirement that an officer must announce his authority and purpose before forcefully entering a private dwelling has received widespread support from the commentators, has been judicially accepted by the courts of this country, and has been enacted into law by a majority of the state legislatures.[13] Indeed, this Court has recognized that the require-

[13] The completeness with which the requirement has been accepted by both English and American authorities is fully described in Mr. Justice Brennan's dissenting opinion in *Ker* v. *California*, 374 U.S. 23, 46-52 (1963). See also *Accarino* v. *United States*, 179 F.2d 456, 460-63 (D.C. Cir. 1949).

ment has become so "deeply rooted in our heritage" that it "should not be given grudging application." *Miller* v. *United States*, 357 U.S. 301, 313 (1958).[14]

Against this background, petitioner urges that the court below did, indeed, give "grudging application" to the statute when it held that the opening of a closed but unlocked door did not constitute a "breaking" within the purview of the statute. The legislative history of Section 3109 and the common law authorities are particularly instructive in this regard.

Prior to codification, the substance of Section 3109 appeared in Title XI of the Espionage Act of 1917, ch. 30, tit. XI, § 8, 40 Stat. 229. As the Conference Report on the

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[14] Nothing in the Court's opinion in *Ker* v. *California*, 374 U.S. 23 (1963), denigrates the fundamental importance of the prior announcement rule to the preservation of individual liberty. The Court there merely held that, in applying the requirement as a Constitutional mandate in state prosecutions, the states could excuse failure of compliance on the part of state officers "where exigent circumstances are present." *Id.* at 39. The question whether the "exigent circumstances" exception is applicable to the conduct of federal officers who fail to comply with the announcement requirement of Section 3109 was expressly reserved in *Miller* v. *United States*, 357 U.S. 301, 309 (1958). See also *Wong Sun* v. *United States*, 371 U.S. 471, 482 (1963).

Even assuming that the statute does permit such an exception, the exception would be wholly inapplicable to this case. The Record is devoid of any indication that the officers' unannounced entry into petitioner's apartment was justified by exigent circumstances. There was nothing to suggest to the police that petitioner was about to destroy any crucial evidence, or was even in a position to do so. In fact, when the agents broke in, they did not even know whether the cocaine had been passed from Jones to petitioner. Nor was there anything "furtive" in petitioner's conduct which would have justified their forceful and unannounced entry. *Ker* v. *California*, *supra* at 40. Finally, there was no indication whatever that anyone inside petitioner's apartment was "in imminent peril of bodily harm," that the officers had reason to believe that an escape might be attempted, or that petitioner already knew "of the officers' authority and purpose." *Id.* at 47 (dissenting opinion).

Act indicated, that title "was based upon the New York law on this subject and follows generally the policy of that law." H.R. Rep. No. 69, 65th Cong., 1st Sess. 20, 55 Cong. Rec. 3305, 3307 (1917).

New York had no unusual laws or policies dealing with the breaking of doors by police officers as of 1917. Rather, it followed the general common law rules of most jurisdictions in the United States, and analogized the breaking by a law officer to the breaking which occurs in a burglary.

Thus, at common law

> "What would be a 'breaking' of the outer door in burglary is equally a breaking by the sheriff when he enters to make a levy or when he, or any other officer, comes to serve any legal process." Voorhees, *Law of Arrest* § 172 (1904).

Accordingly, in an early case, the New York Supreme Court held that

> "What would be a breaking of the outer door in burglary, is equally a breaking by the sheriff." *Curtis* v. *Hubbard,* 1 Hill. 336, 338 (N.Y. 1841).

The definition of "breaking" in relation to the crime of burglary was well-defined both in New York and in other states. In the *Curtis* case, the New York court indicated that

> "It is enough that the outer door be shut. Then, merely opening it is a breaking, within the meaning of the law . . . .
>
> *"Lifting a latch is, in law, just as much a breaking, as the forcing of a door bolted with iron." Ibid.* (Emphasis supplied.)

Forty years later, this definition of breaking was enacted as Section 499 of the New York Penal Code of 1881. It provided, in pertinent part, as follows:

> "§ 499. 'Break' defined.—The word 'break,' as used in this chapter, means and includes,
>
> 1. Breaking or violently detaching any part, internal or external of a building; or,
>
> 2. Opening, for the purpose of entering therein, *by any means whatever,* any outer door of a building, or of any apartment or set of apartments therein separately used or occupied, or any window, shutter, scuttle or other thing used for covering or closing an opening thereto or therein, or which gives passage from one part thereof to another;" (Emphasis supplied.)[15]

Thereafter, the statute was interpreted several times by the courts of New York. In *People* v. *Gartland,* the Appellate Division stated that

> "Section 499 of the Penal Code defines the word 'break' as used in the statute, and declares that it includes *opening,* for the purpose of entering therein, *by any means whatever,* any outer door of a building or of any apartment . . . therein, used or occupied, . . . That definition is satisfied if the proof shows that the appellant opened, *by any means,* the outer door of the apartment . . . . If that door were shut at the time he made his entrance to the apartment, and he opened it *by any means whatever,* he was guilty of the offense."

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[15] New York Penal Code § 499 (1881), *as amended,* New York Penal Law § 400 (1909), *as amended,* L. 1937, ch. 688; *as amended,* L. 1953, ch. 84; *repealed by* Penal Law § 500.05 (1967).

30 App. Div. 534, 535, 52 N. Y. Supp. 352 (1898) (Emphasis supplied.)

In *People* v. *Toland,* a case which was decided only one year before Section 3109 was enacted by Congress, the New York Court of Appeals stated that

> "Nothing is better settled in the law of burglary than that the opening of a latched door constitutes a breaking sufficient to uphold a conviction. Indeed, *if the door is closed it is not necessary to constitute burglary that it should be latched.*" 217 N.Y. 187, 190-91, 111 N.E. 760, 761 (1916) (Emphasis supplied). See *People* v. *Walton,* 159 App. Div. 289, 290, 144 N.Y. Supp. 308, 309 (1913).

New York's definition of a breaking to include *any* entrance through a closed door conformed to the law of numerous other States and to English common law. See, *e.g., Grimes* v. *State,* 77 Ga. 762 (1886); *State* v. *Conners,* 95 Iowa 485, 64 N.W. 295 (1895); *State* v. *Groning,* 33 Kan. 18, 5 Pac. 446 (1885); *State* v. *Moore,* 117 Mo. 395, 22 S.W. 1086 (1893); *Rex* v. *Russell,* 1 Moody 377, 168 Eng. Rep. 1310 (1833); *Rex* v. *Haines,* Russ. & Ry. 451, 168 Eng. Rep. 892 (1821); *Rex* v. *Stock,* 2 Leach 1014, 168 Eng. Rep. 604 (1809). It is therefore not surprising that Professor Wilgus reached the following conclusion in his oft-cited article on arrests:

> "What constitutes 'breaking' seems to be the same [for a sheriff's entrance] as in burglary: lifting a latch, *turning a door knob,* unlocking a chain or hasp, removing a prop to, or pushing open, a closed door of entrance to the house,—even a closed screen door . . . ."

Wilgus, *Arrest Without a Warrant,* 22 Mich. L. Rev. 798, 806 (1924) (Emphasis supplied.)

In short, the Congressional reference to the New York law as the model for Section 3109 makes it clear that that Section was designed to incorporate, at the very least, the general common law understanding of what constituted a breaking in connection with the crime of burglary. The common law authorities and state court decisions cited above leave no room for doubt that, at common law, a breaking encompassed any opening of a closed door—regardless of the position of the door lock, bolt, or chain.

B. The Objectives Served by Section 3109 Require Compliance With the Announcement Provisions of the Statute, Even Though the Police Enter Through a Closed but Unlocked Door.

As this Court has stated on numerous occasions, the rules governing arrests and searches and seizures are not mere procedural formalities. *E.g., Stanford* v. *Texas,* 379 U.S. 476, 485 (1965); *McDonald* v. *United States,* 335 U.S. 451, 455 (1948). They were not created "to shield criminals nor to make the home a safe haven for illegal activities." *Ibid.* Nor have they been established without due recognition "of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law." *Miller* v. *United States,* 357 U.S. 301, 313 (1958). Rather, as the Court said in *Wong Sun* v. *United States,* 371 U.S. 471, 484 (1963), these rules have been developed "in order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person."

The requirement of Section 3109 is an essential part of the panoply of procedures which have been developed by Congress and this Court to enforce the substantive rights guaranteed by the Fourth Amendment. *Miller* v. *United States,* 357 U.S. 301, 313 (1958). Essentially, the announcement requirement of the statute seeks to accomplish three objectives, each of which is applicable to a case involving the entry by federal officers through a closed but unlocked door. The three objectives are (1) preservation of the individual's right to be free from unexpected, embarrassing, and frightening intrusions into the privacy of his home, (2) insistence upon police conduct which is consonant with the presumption of innocence, and (3) protection of the life and limb of the entering police officers, as well as of those occupying the dwelling.

(1) *Right to privacy*—As this Court recognized in *Miller* v. *United States,* 357 U.S. 301, 307 (1958), the announcement requirement of Section 3109 is intended to protect "the precious interest of privacy summed up in the ancient adage that a man's house is his castle." It establishes one of the essential preconditions for "a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948).

Surely, the security and privacy which each individual finds within the confines of his home would be severely eroded were the police given authority to barge in upon him without even first announcing their identity and purpose. The shock and fright caused by such an intrusion are manifestly inconsistent with the principles of the Fourth Amendment. As Mr. Justice Brennan indicated in his dissenting opinion in *Ker* v. *California,* 374 U.S. 23, 57 (1963):

> "[C]ases of mistaken identity are surely not novel in the investigation of crime. The possibility is very real that the police may be misinformed as to the name or address of a suspect, or as to other material information. That possibility is itself a good reason for holding a tight rein against . . . unannounced police entries into private homes. Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion."

Since one of the underpinnings for the announcement requirement of Section 3109 is the fundamental right to privacy, there simply is no justification for a rule which would make the requirement applicable to locked doors and inapplicable to closed but unlocked doors. By the very act of closing his door—whether or not he locks it—the occupant of a dwelling has signified his intention to enjoy the privacy of his home and to admit only those persons who are invited.

(2) *Presumption of innocence*—The requirement that federal officers pause to knock at doors and announce their identity and purpose is also designed to insure police conduct consonant with the presumption of innocence which inheres in our system of justice. If that presumption is to be given vitality—and not replaced "lightly" by a presumption of guilt, *United States* v. *Di Re*, 332 U.S. 581, 593-95 (1948)—then, it must be assumed, absent specific facts leading to a contrary conclusion, that the occupant of a dwelling will respond to the officers' announcement and admit them into his house upon a proper description of their authority and purpose. See *Ker* v. *California*, 374 U.S. 23, 56 (1963) (dissenting opinion); *Ratcliffe* v. *Burton*, 3 Bos. & Pul. 223, 230; 127 Eng. Rep. 123, 127 (1802).

Certainly, there is no appropriate ground for bestowing a stronger presumption of innocence on one who locks his closed door than on the unfortunate person who lacks sufficient foresight to turn his latch key or to secure his door bolt. See *Keiningham* v. *United States*, 287 F.2d 126, 130 (D.C. Cir. 1960). Nor is there any conceivable reason to believe that the individual who lives behind locked doors is more likely to respond to the policeman's request for admission than the occupant who has left his door unlocked.

(3) *Avoidance of unnecessary violence*—Twenty years ago, Mr. Justice Jackson noted that "many homeowners in this crime-beset city doubtless are armed." *McDonald* v. *United States*, 335 U.S. 451, 460 (1948) (concurring opinion). What was true then of the District of Columbia is at least equally true today of many of our large urban centers. See *Report of the National Advisory Commission on Civil Disorders*, 523 (1968). The announcement requirement of Section 3109 represents an effort to minimize the violence which will inevitably accompany unannounced intrusions into private dwellings. When closed doors or windows are opened by uninvited and unannounced persons, the possibilities for unnecessary violence are greatly increased. As Mr. Justice Jackson stated, in disapproving surreptitious intrusions by law enforcement officers:

> "I have no reluctance in condemning . . . a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves."
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> • • •
>
> "When a woman sees a strange man in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot." *McDonald* v. *United States*, 335 U.S. 451, 460-61 (1948).

Insofar as Section 3109 seeks to protect police officers and to reduce the chances of violence attendant upon unannounced intrusions into private dwellings, no logical basis exists for excluding entry through a closed but unlocked door from its coverage. The individual who is enjoying the privacy of his home behind an unlocked door is just as likely to shoot at the unannounced officer who walks through the door as is the person who locked his door.

Because Section 3109 embodies objectives which are fundamental to individual liberty, no distinction worthy of judicial recognition should exist between locked and unlocked doors. To the extent that the lower court's decision rests upon the property concept that a breaking requires force and resultant damage to the door or lock,[16] it is clearly inconsistent with the objectives served by the statute and with this Court's recent Fourth Amendment decisions. As the Court stated only last Term:

> "The premise that property interests control the right of the Government to search and seize has been discredited . . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts." *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967). See also *Katz* v. *United States*, 389 U.S. 347, 352-53 (1967).

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[16] That this seems to have been a primary basis for the lower court's decision is reflected in its statement that "the word 'break' has been taken far enough from the connotations of force which usually accompany it, and we are not willing to take it any further for the purpose of enlarging a rule of exclusion." (R. 58).

C. The Decisions of This Court and of Lower Federal Courts Support the Proposition That the Term "Break" in Section 3109 Encompasses Entries by Law Enforcement Officers Through Closed but Unlocked Doors.

In *Miller* v. *United States*, 357 U.S. 301 (1958), this Court held that an unlawful breaking was committed when officers forced open a door held partially closed by a chain, without first complying with the announcement requirement of Section 3109. The Court stated that Section 3109 represented an attempt by Congress to codify "a tradition embedded in Anglo-American law," a tradition which bespoke "the reverence of the law for the individual's right of privacy in his house," *id.* at 313. It went on to declare that

> "Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house." *Ibid.*

Although this Court has not previously considered whether entry through a closed but unlocked door constitutes a breaking within the meaning of Section 3109, its recognition of the relationship of that statute to "the reverence of the law for the individual's right of privacy in his house" certainly suggests that the announcement requirement of the statute should obtain in such a situation.

The Court has made clear, in another Fourth Amendment context, that it places little significance on the presence or absence of a lock on a closed means of entry. In *Chapman* v. *United States*, 365 U.S. 610 (1961), a landlord consented to a search of his tenant's house by police officers. One of the officers forced open a closed but unlocked win-

dow and entered the house. Once inside, the officer found an unregistered distillery and 1,300 gallons of mash. Based on that discovery, the officer arrested the tenant upon his return to the house. In holding that the officer's search of the house was unlawful and that the evidence seized during the search should have been suppressed, this Court rejected the argument that a landlord has an absolute right to enter his tenant's dwelling with the police to view waste. It did so on the ground that the landlord has such a right only if his entry into the tenant's premises does not involve the "breaking" of windows or doors. The Court concluded that that fundamental precondition had not been met, since the "landlord and the officers forced open a[n unlocked] window to gain entry to the premises." *Id.* at 616.

The distinction between locked and unlocked doors drawn by the court below has not found favor in other federal courts. In *Keiningham* v. *United States,* 287 F.2d 126 (1960), the Circuit Court of Appeals for the District of Columbia found that a police officer's unannounced entry through a closed but unlocked door in a partition separating two houses was an unlawful breaking within the meaning of Section 3109. The court specifically rejected the type of distinction drawn by the Ninth Circuit in the instant case, as follows:

> "We think that a person's right to privacy in his home (and the limitation of authority to a searching police officer) *is governed by something more than the fortuitous circumstance of an unlocked door,* and that the word 'break,' as used in 18 U.S.C. § 3109, means 'enter without permission.' We think that a 'peaceful' entry which does not violate the provisions of § 3109 must be a permissive one, and not merely one which does not

result in a breaking of parts of the house. We hold that the officers 'entered' . . . when they passed through the door in the partition . . . . " *Id.* at 130 (Emphasis supplied).

Similarly, in *Hair* v. *United States,* 289 F.2d 894 (1961), the District of Columbia Circuit Court of Appeals ruled that an unannounced entry could not be tolerated "whether the door to Hair's home was locked, closed but unlocked, or merely left ajar." *Id.* at 897.[17] See also *United States* v. *Poppitt,* 227 F. Supp. 73, 79-80 (D. Del. 1964).

There can be little doubt that the position adopted in these decisions with respect to what constitutes a breaking under Section 3109 is better calculated to achieve the purposes of that statute and to preserve the fundamental rights

[17] The same Court of Appeals has also held that police officers, who persuaded the occupant of an apartment to open his door by posing as Western Union deliverymen, and then forced their way into the apartment without announcing "the true reason" for their presence, committed an illegal entry. *Gatewood* v. *United States,* 209 F.2d 789, 791 (1953). This ruling seems correct, even though the door was initially opened voluntarily by the occupant. See *Wong Sun* v. *United States,* 371 U.S. 471, 482-83 (1963). It fully conforms to the common law and statutory background against which Section 3109 was enacted. See pp. 18-24, *supra.* Section 499 of the New York Penal Code included within its definition of breaking "an entrance . . . by any threat or artifice used for that purpose . . . . " This definition was based upon numerous common law rulings which hold that an entry into a house by trick or ruse with the intent to commit burglary constituted a "constructive breaking." See, *e.g., State* v. *Mordecai,* 68 N.C. 207 (1873); *Johnston* v. *Commonwealth,* 85 Pa. 54 (1877). Moreover, such a ruling fully conforms to the objectives which underlie Section 3109 (see pp. 24-28, *supra*), and is consistent with the Fourth Amendment principle that entry obtained by "stealth" can be as repugnant as entry gained through "force or coercion." *Gouled* v. *United States,* 255 U.S. 298, 305 (1921).

guaranteed by the Fourth Amendment, than is the hypertechnical rule formulated by the court below.[18]

Because the entry of federal officers into petitioner's apartment constituted an unlawful breaking in violation of Section 3109, the officer's subsequent arrest of petitioner was equally unlawful, and the evidence seized during the search which followed that arrest should have been suppressed.[19] *Miller* v. *United States*, 357 U.S. 301, 313-14 (1958). See also *Weeks* v. *United States*, 232 U.S. 383, 398 (1914).

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[18] It would appear that the lower court may itself have been somewhat embarrassed by the highly artificial distinction upon which it saw fit to rest its decision. As the court admitted:

> "Where officers without authority of the tenant secure a pass key from the landlord and enter by means of the key, such is a breaking . . . . We realize that the distinction between using a door knob to turn a latch, and using a key obtained without permission to turn a bolt, may be slight." (R. 58).

[19] The cocaine was introduced into evidence and should have been excluded. In addition, although the balloons and aluminum foil squares found in petitioner's apartment during the search were not offered, one of the officers testified as to their presence in the apartment and as to their incriminating nature. Since these statements may have prejudiced the jury in its evaluation of petitioner's denial that Jones had delivered any narcotics to him, and in his suggestion that the narcotics were planted in his apartment (R. 40-41), they should have been excluded from evidence. See *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1919); *Nardone* v. *United States*, 302 U.S. 379, 382 (1937). The admission of the officer's testimony about these seized items was clearly harmful error. *Chapman* v. *California*, 386 U.S. 18, 22-24 (1967).

II.

The Nighttime Arrest of Petitioner in His Apartment—Executed by Means of an Unannounced, Unconsented to Entry—Was Unlawful Because of the Federal Officers' Failure to Obtain a Warrant of Any Kind; Consequently, the Evidence Seized in the Search Which Followed That Arrest Should Have Been Excluded at Petitioner's Trial.

Regardless of whether the officers' unannounced nighttime entry into petitioner's apartment violated Section 3109, the subsequent arrest should nevertheless be declared unlawful because it was executed under circumstances which do not excuse the officers' failure to obtain a warrant.[20]

The specific question raised by this section of the Brief has never been resolved by the Court. In *Jones* v. *United States,* 357 U.S. 493, 499-500 (1958), the Court acknowledged that

> "[W]hether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within upon

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[20] Although the question of the need for an arrest warrant was not specifically raised by the petition for certiorari, it was encompassed within petitioner's contention at the trial that the arrest was unlawful because it had been executed "without a warrant" (R. 28). Because the warrant question clearly relates to the basic issue raised by the petition—*i.e.*, the lawfulness of the manner in which the arrest was made—it may properly be considered under the provision of Rule 23(1)(c) of this Court's Rules that "the statement of a question presented will be deemed to include every subsidiary question fairly comprised therein." See, *e.g.*, *Mapp* v. *Ohio,* 367 U.S. 643, 646, 673-74 (1961). The warrant question may also be reviewed pursuant to the Court's power to "notice a plain error not presented." Supreme Court Rule 40(1)(d)(2); see *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 412 (1947); *Sibbach* v. *Wilson & Co.,* 312 U.S. 1, 16 (1940); *Brasfield* v. *United States,* 272 U.S. 448, 450 (1926); *Mahler* v. *Eby,* 264 U.S. 32, 45 (1923); *Weems* v. *United States,* 217 U.S. 349, 362 (1910).

> probable cause that he had committed a felony, under circumstances where no reason appears why an arrest warrant could not have been sought, is consistent with the Fourth Amendment",

presents a "grave constitutional question." For the reasons stated below, petitioner suggests that the time has now come to answer the question left open in *Jones,* and urges that it be answered in the negative.

A. This Court Has Consistently Stressed the Importance of Prior Judicial Intervention Before the Police Execute an Arrest or Conduct a Search—Particularly When an Intrusion Into the Home Is Involved.

As this Court has recognized on numerous occasions, the role which the warrant procedure plays in protecting the citizen from unreasonable police conduct cannot be overemphasized. In *Wong Sun* v. *United States,* 371 U.S. 471, 481-82 (1963), the Court said:

> "The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause."

In *Giordenello* v. *United States,* 357 U.S. 480, 486 (1958), the importance of the independent role played by the magistrate was restated as follows:

> "The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge

> for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."

Moreover, the decisions of this Court teach that a special significance attaches to the warrant procedure when an invasion of a private dwelling is involved, because "the home" has always been viewed as a preferred place, *Brinegar* v. *United States,* 338 U.S. 160, 176 (1949); *Davis* v. *United States,* 328 U.S. 582, 592-93 (1946), whose "seal of sanctity" is not to be broken lightly. *Lewis* v. *United States,* 385 U.S. 206, 211, 213 (1966). As the Court said in *Silverman* v. *United States,* 365 U.S. 505, 511 (1961):

> "At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." See *Camara* v. *Municipal Court,* 387 U.S. 523, 528 (1967); *Wolf* v. *Colorado,* 338 U.S. 25, 27-28 (1949).

Thus, it is not surprising that, time and again, this Court has stressed the paramount need for the police to obtain the authorization of a magistrate before entering a private dwelling. For example, in *Johnson* v. *United States,* 333 U.S. 10, 14 (1948), the Court said:

> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

See also *United States* v. *Ventresca*, 380 U.S. 102, 106-07 (1965); *Aguilar* v. *Texas*, 378 U.S. 108, 110-13 (1964).

Admittedly, exceptions to the requirement that there be judicial intervention prior to an invasion of the home have been recognized. Thus, police officers need not delay to obtain a warrant, "if to do so would gravely endanger their lives or the lives of others." *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967). A warrant may also be dispensed with if the police have substantial reason to believe that crucial evidence is in imminent danger of being destroyed. *Ker* v. *California*, 374 U.S. 23, 41-42 (1963). In addition, some searches of homes without search warrants have been sustained if made incident to lawful arrests supported by arrest warrants. See, *e.g.*, *Rabinowitz* v. *United States*, 339 U.S. 56 (1950); *Harris* v. *United States*, 331 U.S. 145 (1947);[21] but see *Kremen* v. *United States*, 353 U.S. 346 (1957).

This Court has admonished, however, that these exceptions to the warrant procedure "have been jealously and

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[21] It should be noted that in both *Rabinowitz* and *Harris*, arrest warrants had been obtained prior to the entry by the police. Thus, in *Harris* v. *United States*, 331 U.S. 145, 153 (1947), the Court said:

> "This is not a case in which law enforcement officials have invaded a private dwelling without authority and seized evidence of crime. . . . Here the agents entered the apartment under the authority of lawful warrants of arrest."

This point was stressed again by four Justices in their dissenting opinion in *Abel* v. *United States*, 362 U.S. 217, 249 (1959):

> "In *Harris* and *Rabinowitz*, the broad search was performed as an incident to an arrest for crime under warrants lawfully issued. . . . The issuance of these warrants [of arrest] is by no means automatic—it is controlled by a constitutionally prescribed standard. It thus could be held that sufficient protection was given the individual without the execution of a second warrant for the search."

See also *Wong Sun* v. *United States*, 371 U.S. 471, 480, n. 8 (1963).

carefully drawn." *Jones* v. *United States*, 357 U.S. 493, 499 (1958). Consistent with that admonition, there is no basis for excusing the officers' failure to obtain a warrant of any kind under the circumstances of this case.

B. The Fourth Amendment Requires That Officers Who Execute a Nighttime Arrest in a Private Dwelling Must Obtain an Arrest Warrant in the Absence of Emergency Circumstances Which Would Require Immediate Action.

The facts of this case relating to the conduct of the arresting officers are not in dispute. The informant whose statements constituted the principal basis for the arrest was within the agents' custody for a full day. The telephone conversation between Jones and "Johnny"—upon which the court below also supported its assertion of probable cause—occurred approximately five hours prior to the arrest. The alleged delivery of the narcotics to petitioner could have been made at almost any time the officers chose to take Jones to petitioner's apartment. In short, the officers were in virtually complete control of the situation. They had ample time to obtain the independent determination of a magistrate as to whether their contemplated arrest of petitioner in his home was lawful, but they failed to do so.[22] Instead, they proceeded to petitioner's home at

[22] Had the officers gone to a magistrate before proceeding to petitioner's apartment house, it is entirely possible that the magistrate would have found an absence of probable cause. Indeed, it is unlikely that the officers had probable cause to make an arrest at the time they brought Jones to the building in which petitioner's apartment was located. Their original information concerning the involvement of a second person in the transporting of cocaine had come from an unreliable informant who was himself arrested while importing narcotics in violation of the law. Compare *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Draper* v. *United States*, 358 U.S. 307 (1959). Their primary corroborative evidence of Jones' information was obtained from a telephone call which Jones made to a number

night, forced their way, unannounced, into his apartment, arrested him, and then conducted a general search of the

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answered by a man named "Johnny." The conversation between the two men was ambiguous, and the agents performed no independent investigative work to verify whatever information they obtained from it or from Jones. See *Wong Sun* v. *United States*, 371 U.S. 471, 481 (1963); *Gilbert* v. *United States*, 366 F.2d 923 (9th Cir.), *cert. denied*, 388 U.S. 922 (1967); *United States* v. *Irby*, 304 F.2d 280 (4th Cir.), *cert. denied*, 371 U.S. 830 (1962); *Rodgers* v. *United States*, 267 F.2d 79 (9th Cir. 1959).

However, any fear which the agents had that they might not have persuaded a magistrate to issue a warrant does not excuse their failure to apply for one. If anything, it underscores the importance of the need for a judicial check on their action and for supplemental independent investigation to corroborate their suspicion. For example, they could have checked the police files to determine whether Jones had a prior narcotics record or had previously furnished reliable information to the police. They also could have traced the telephone number which Jones called to ascertain the name under which it was listed and whether it was located at the house in which Jones said his accomplice lived.

Despite their complete control of the situation, they chose to do none of these things, but, instead, proceeded directly to petitioner's apartment, and outfitted Jones with an electronic bug—the unauthorized use of which is not beyond challenge. See *Osborn* v. *United States*, 385 U.S. 323 (1960); compare *Lopez* v. *United States*, 373 U.S. 427 (1963). Since the information which they obtained by use of that device added little to their prior knowledge, it is equally unlikely that the officers had probable cause at the time they entered the apartment with their guns drawn. In view of their unwillingness to conduct any independent investigation before sending Jones into the apartment, the agents probably could have been reasonably certain that probable cause existed only after Jones emerged either without the narcotics or with the promised $100. At that time, one of the agents should have applied for a warrant—while the others stood guard at the apartment to insure against petitioner's escape or the disposal of the cocaine—unless extraordinary circumstances existed which would have required immediate action. See *Johnson* v. *United States*, 333 U.S. 10, 15 (1948).

What clearly emerges, however, is that, because of the closeness of the probable cause question at the various relevant times involved in this case, a magistrate—and not the officers—should have decided whether and when a reasonable basis existed for petitioner's arrest. Instead of taking all steps reasonable under the circumstances to obtain authority for their invasion of petitioner's home, the agents acted recklessly and in complete defiance of the warrant procedure.

apartment. In the absence of circumstances requiring such precipitous action—of which there are none in this case—such conduct on the part of the police should not be tolerated.

There are several persuasive reasons why the Court should now decide the question left open in *Jones* v. *United States,* 357 U.S. 493, 499-500 (1958), and hold that the conduct of the federal officers in this case was unlawful due to their failure to obtain a warrant.

(1) In view of the fact that "the Fourth Amendment's commands . . . are practical and not abstract", *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965), some of the Court's recent decisions appear to have sanctioned carefully circumscribed, but nevertheless, somewhat relaxed standards for determining whether probable cause exists to support an arrest. Thus, a reliable informant's statement that a person was peddling narcotics was found sufficient to constitute probable cause when corroborated merely by the facts that the informant's description of the defendant's appearance and of his whereabouts on a given morning were later borne out. *Draper* v. *United States,* 358 U.S. 307, 313 (1959). Under appropriate circumstances, hearsay alone may be sufficient to justify the issuance of a warrant, provided there is a "substantial basis for crediting the hearsay", *Jones* v. *United States,* 362 U.S. 257, 272 (1960)—such as a sufficient description of the "underlying circumstances" of the informant's reliability and his accusatory statements to enable a magistrate to make a balanced judgment. *Aguilar* v. *Texas,* 378 U.S. 108, 114-15 (1964). In addition, only last Term, the Court declared that, under appropriate circumstances, police officers making warrantless arrests based on credible information from

reliable informants need not identify those informants, despite a challenge to the probable cause basis for the officers' action. *McCray* v. *Illinois,* 386 U.S. 300 (1967).

As a corollary to the wider latitude accorded the police in establishing the existence of probable cause, it is imperative that the Court require a more consistent adherence to the warrant procedure. If, for example, an officer may justify an arrest on the basis of the credible hearsay statements of a secret, reliable informant, then surely it is not unreasonable to insist that, when the circumstances permit it, the existence of probable cause "be decided by a judicial officer" and "not by a policeman or Government enforcement agent." *Johnson* v. *United States,* 333 U.S. 10, 14 (1948). Such a requirement would be consistent with "the preference accorded police action taken under a warrant." *United States* v. *Ventresca,* 380 U.S. 102, 107 (1965). See *Aguilar* v. *Texas,* 378 U.S. 108, 110-11 (1964); *United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1931).

Any requirement short of this would too easily facilitate a *post-facto* justification for the arrest on the basis of evidence obtained through the warrantless arrest and the usual, incidental search. As the Court noted in *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964):

> "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of *an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.*" (Emphasis supplied.)

In short, if a viable judicial check is to be placed on the growing practice of using the hearsay statements of in-

formants as the basis for arrests, greater emphasis must be placed on the fundamental safeguards of the warrant procedure.[23] See Comment, 53 Calif. L.Rev. 840, 856-58 (1965). As a first, but significant, step in that direction, the police should certainly be required to obtain an arrest warrant under the circumstances presented by this case.

(2) The Fourth Amendment cases considered by this Court clearly indicate that arrests executed in private dwellings almost inevitably lead to a general search of the premises. See, *e.g.*, *Ker* v. *California*, 374 U.S. 23 (1963); *Rabinowitz* v. *United States*, 339 U.S. 56 (1950); *Harris* v. *United States*, 331 U.S. 145 (1947). In some cases, the police may even time the arrest so that it can take place in a home, the search of which can thereafter be justified as incident to the arrest. See *McKnight* v. *United States*, 183 F.2d 977 (D.C. Cir. 1950). Indeed, the circumstances surrounding petitioner's arrest suggest that the agents in this case were at least as interested in rummaging through his apartment in search of narcotics as they were in simply arresting him for a crime which they believed he had committed.

In view of the broad incidental search and seizure powers conferred on arresting officers—which, under limited circumstances, includes even the power to seize "mere evidence," *Warden* v. *Hayden*, 387 U.S. 294 (1967)—there can

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[23] As has been noted, a mandate from this Court seems necessary if the police are to be persuaded that they should seek arrest warrants if the circumstances permit. See, *e.g.*, Broeder, *Wong Sun* v. *United States, A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 493 (1963). For example, a random survey of 770 arrests in Philadelphia in 1952, disclosed that only 24, or about 3%, were executed pursuant to warrants. Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. Pa. L. Rev. 1182, 1183 (1952).

be no justification, in the absence of extraordinary facts, for their failure to obtain an arrest warrant, particularly when the arrest is to be executed at night in a private dwelling. Indeed, the Court in *Hayden* seemed to imply that the warrant procedure should be a necessary prerequisite to an officer's right to conduct incidental searches of living premises in view of the broadened scope of such searches authorized by the decision in that case. The Court said:

> "Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. *A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact.*"
>
> • • •
>
> "[I]f its rejection [the mere evidence limitation] does enlarge the area of permissible searches, *the intrusions are nevertheless made after fulfilling the probable cause and particularity requirement of the Fourth Amendment and after the intervention of 'a neutral and detached magistrate.'*" *Id.* at 301-02, 309-10 (Emphasis supplied).

(3) A stringent warrant requirement would serve the legitimate interests of law enforcement as much as the guarantees of individual freedom embodied in the Fourth Amendment. Recourse to the magistrate would provide the police with an informed, independent judgment as to whether probable cause then existed to justify an arrest, or whether additional investigation should be undertaken before a lawful arrest could be executed. Moreover, the magistrate could assist the officer in establishing a proper

record. For example, the contemporaneous, probing questions of the magistrate might reveal facts supporting the existence of probable cause which the police officer might not have considered relevant, or which he might have forgotten by the time a subsequent hearing on a motion to suppress evidence could be held.

Although the magistrate's judgment is not binding, this Court has nevertheless acknowledged that "the reviewing court will pay substantial deference to judicial determinations of probable cause." *Aguilar* v. *Texas,* 378 U.S. 108, 111 (1964). It has also indicated that, since it strongly supports

> "searches under a warrant, . . . in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall." *United States* v. *Ventresca,* 380 U.S. 102, 106 (1965).

In *Ventresca,* the compatibility between the warrant procedure and the legitimate interests of law enforcement was specifically recognized, as follows:

> "This Court is equally concerned to uphold the actions of law enforcement officers consistently following the proper constitutional course. This is no less important to the administration of justice than the invalidation of convictions because of disregard of individual rights or official overreaching." *Id.* at 111-12.

Over thirty-five years ago, this Court announced that "the informed and deliberate determinations of magistrates empowered to issue warrants . . . are to be preferred over the hurried action of officers . . . who may happen to make arrests." *United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1931). The reason for this preference was described by

the Court in *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948), as follows:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

See also *Katz* v. *United States*, 389 U.S. 347, 354-56 (1967).

Petitioner urges the Court to reenforce its preference for the warrant procedure by requiring, at the very least, that, in the absence of circumstances necessitating immediate action, police officers must obtain an arrest warrant before they may execute a nighttime arrest in a private dwelling.[24] See *Gatlin* v. *United States*, 326 F.2d 666, 671, n. 10 (D.C. Cir. 1963). Because the federal agents failed to obtain such a warrant in this case, and because the Record reflects a complete absence of any circumstances which would excuse

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[24] The importance of such a requirement was recognized by the Court of Appeals for the District of Columbia, as follows:

> "Unless the necessities of the moment require that the officer break down a door, he cannot do so without a warrant; and if in reasonable contemplation there is opportunity to get a warrant, or the arrest could as well be made by some other method, the outer door to a dwelling cannot be broken to make an arrest without a warrant. The right to break open a door to make an arrest requires something more than the mere right to arrest. If nothing additional were required, a man's right of privacy in his home would be no more than his rights on the street; and the right to arrest without a warrant would be precisely the same as the right to arrest with a warrant. The law is otherwise." *Accarino* v. *United States*, 179 F.2d 456, 464 (1949).

their failure to do so, petitioner's arrest was unlawful, and the evidence seized in his apartment should have been suppressed.[25]

Conclusion

For the reasons stated, the judgment of the Court of Appeals should be reversed, and petitioner's conviction should be set aside.

Respectfully submitted,

MURRAY H. BRING
1229 Nineteenth Street, N.W.
Washington, D.C. 20036
Attorney for Petitioner

March 1968

[25] See footnote 19, *supra*, p. 32.